Supreme Court, U.S.
FILED

No. 091535 JUN 14 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

LANA PEREZ and ELENA LEFFLER,

Petitioners,

v.

SAKS FIFTH AVENUE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
schnapp@u.washington.edu
Seattle, WA 98195
(206) 616-3167

ERIKA DEUTSCH ROTBART
DEUTSCH ROTBART & ASSOCIATES, P.A.
4755 Technology Way
Boca Raton, FL 33431
erotbart@dralawfirm.com
(561) 361-8010

Attorneys for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Where a discrimination plaintiff asserts that the ultimate decisionmaker who dismissed her was influenced by a different official who acted with an unlawful motive, must the plaintiff prove that the ultimate decisionmaker was a "mere conduit" for the motives of the unlawfully motivated official?

PARTIES

The parties are set forth in the caption.

TABLE OF CONTENTS

Page

Question Presented i

Parties ii

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 2

Statement 2

Reasons for Granting the Writ 7

Conclusion 11

Appendix

Opinion of the Court of Appeals for the Eleventh Circuit, January 21, 2010 ..... 1a

Opinion of the District Court for the Southern District of Florida, January 5, 2009 ..... 3a

Order of the Court of Appeals for the Eleventh Circuit Denying Rehearing and Rehearing En Banc, March 17, 2010 ..... 25a

TABLE OF AUTHORITIES

Page

CASES

Byrd v. Illinois Dept. of Public Health, 423 F.3d 696 (7th Cir. 2005) 9, 10

Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008) 8

Dees v. Hyundai Motor Mfg. Alabama, LLC, 2010 WL 675714 (11th Cir. 2010) 8

Dwyer v. Ethan Allen Retail, Inc., 325 Fed.Appx. 755 (11th Cir. 2009) 8

Hampton v. City of South Miami, 186 Fed.Appx. 967 (11th Cir. 2006) 8

Jennings v. Illinois Department of Corrections, 496 F.3d 764 (7th Cir. 2007) 9

Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236 (11th Cir. 1998) 9, 10

Long v. Teacher's Retirement System of Illinois, 585 F.3d 344 (7th Cir. 2009) 9

Malu v. City of Gainesville, 270 Fed.Appx. 945 (11th Cir. 2008) 8

Phelan v. Cook County, 463 F.3d 733 (7th Cir. 2006) 9

Quinn v. Monroe County, 330 F.2d 1320 (11th Cir. 2003) 9

Roberts v. Randstad North America, Inc., 231 Fed.Appx. 890 (11th Cir. 2007) 8

TABLE OF AUTHORITIES – Continued

Page

Schreiner v. Caterpillar, Inc., 250 F.3d 1096 (7th Cir. 2001) 9

Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) 9

Shockley v. Healthsouth Central Georgia Rehab. Hospital, 293 Fed.Appx. 742 (11th Cir. 2008) 8

Staub v. Proctor Hospital, 560 F.3d 647 (7th Cir. 2009), *certiorari granted*, 2010 WL 1525785 (2010) ..... *passim*

Stimpson v. City of Tuscaloosa, 186 F.3d 1328 (11th Cir. 1999) 4, 8, 9

Tucker v. Housing Authority of the Birmingham Dist., 229 Fed.Appx. 820 (11th Cir. 2007) 8

Tucker v. Talladega City Schools, 171 Fed.Appx. 289 (11th Cir. 2006) 8

Wills v. Marion County Auditor's Office, 118 F.3d 542 (7th Cir. 1997) 9

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 623(a)(1) 2

29 U.S.C. § 623(d) 2

TABLE OF AUTHORITIES – Continued

Page

BRIEFS

Brief for Defendant-Appellee-Cross-Appellant 5, 6

Petition for Panel Rehearing and Suggestion for Rehearing En Banc 7

Petition for Writ of Certiorari, *Staub v. Proctor Hospital* 8

Petitioners Lana Perez and Elena Leffler respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on January 21, 2010.

OPINIONS BELOW

The January 21, 2010 opinion of the court of appeals, which is not reported, is set out at pp. 1a-2a of the Appendix. The March 17, 2010, order of the court of appeals denying rehearing and rehearing en banc is set out at pp. 25a-26a of the Appendix. The January 5, 2009 opinion of the district court, which is reported at 592 F.Supp.2d 1388 (S.D.Fla. 2009), is set out at pp. 3a-24a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on January 21, 2010. The order of the court of appeals denying rehearing and rehearing en banc was entered on March 17, 2010. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 623(a)(1) of 29 U.S.C. provides:

> Employment practices. It shall be unlawful for an employer –
>
> (1) to fail or refuse to fire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age ...

Section 623(d) of 29 U.S.C. provides in pertinent part:

> Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for any employer to discriminate against any of his employees or applicants for employment ... because such individual ... has opposed any practice made unlawful by this section....

STATEMENT

Plaintiffs were long time employees at a Saks Fifth Avenue store in Bal Harbour, Florida, responsible for selling high-end couture women's clothing. In 2006 they were dismissed under circumstances that remain in dispute. The plaintiffs alleged that they were terminated because of their age and in retaliation for complaining about age-based discrimination. At the time of the dismissal Perez was 54 years old

and Leffler was 58. Saks contended that the plaintiffs were fired because they had given unauthorized discounts to customers at the store and because they had permitted improper returns of merchandise. Perez and Leffler asserted that Saks had authorized the discounts, and that the merchandise returns were proper.

The final decision to dismiss the plaintiffs was made by a regional Human Resources Director, Margaret Phelan. Ms. Phelan worked in a New York City office of Saks; she had no personal knowledge of the facts related to the plaintiffs, but relied on information provided to her by Saks officials in Florida. The central dispute at trial was whether Phelan had been influenced (and if so, how much) by other Saks officials who wanted to get rid of Perez and Leffler because of their age or because they had complained about discrimination. (App. 5a). A jury returned a verdict in favor of both plaintiffs, finding that Perez and Leffler both had been dismissed because of age and in retaliation for having complained about age discrimination. The jury awarded $370,000 in damages to Perez, and $240,000 in damages to Leffler. (App. 3a-4a).

Saks moved for judgment as a matter of law. It argued that there was insufficient evidence that age or retaliation was a factor in the decision to dismiss the plaintiffs. The district court, which had earlier denied Saks' pre-trial motion for summary judgment, granted the defense motion and set aside the jury verdict.

The district court concluded that the jury could reasonably have found that one Saks official, Raymond Terbecki, was motivated by bias against the plaintiffs because of their age. (App. 5a).[1] The court held, however, that the asserted connection between Terbecki and the official who made the final decision, Phelan, did not satisfy the Eleventh Circuit's legal standard. That standard, which the district judge noted was "known as the 'cat's paw' theory," (App. 5a), required the plaintiff to show that Phelan was "a mere conduit for the discriminatory bias of [the unlawfully motivated official]." (App. 5a). The district court's analysis repeatedly reiterated its reliance on the Eleventh Circuit "mere conduit" or "cat's paw" standard,[2] relying on that Circuit's decision in *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999). (App. 5a). It concluded that "no reasonable juror could conclude that in taking adverse employment action against Plaintiffs, Phelan acted as

---

[1] "A reasonable juror could have found that [Raymond] Terbecki harbored age based animus towards Plaintiffs." (App. 5a). The district court concluded, on the other hand, that there was insufficient evidence of age bias or a retaliatory motive on the part of a second Saks official, Gloria Salerno. (App. 6a-13a). The correctness of the district court's view of the evidence regarding bias on the part of Salerno was raised on appeal, but was not addressed by the court of appeals.

[2] App. 5a ("mere conduit"), 14a ("cat's paw," "mere conduit"), 15a ("mere conduit" used two times), 17a ("mere conduit"), 18a ("mere conduit"), 23a ("conduit" used twice, "cat's paw" used three times), 24a ("mere conduit").

a mere condu[i]t for Terbecki[']s] ... age animus." (App. 24a).[3]

The district court may have granted judgment as a matter of law on a second ground as well. In several passages in his opinion the district judge stated that there was no evidence that Terbecki had influenced Phelan. (App. 14a-15a). In some iterations, on the other hand, the district court opinion links the standards in a way which suggests that by "influence" the district judge *meant* sufficient influence to turn Phelan into a "mere conduit."[4]

On appeal Saks defended on two distinct grounds the award of judgment as a matter of law. First, Saks argued that the evidence did not satisfy the "conduit" or "cat's paw" standard.[5] In this regard Saks relied repeatedly on the Seventh Circuit decision in *Staub v. Proctor Hospital*, 560 F.3d 647 (7th Cir. 2009), *certiorari granted*, 2010 WL 1525785 (2010). Quoting *Staub*, Saks asserted that "[t]o be a cat's paw ...

---

[3] The district court also concluded that there was insufficient evidence that Phelan acted as a mere conduit for any unlawful motive on the part of Salerno.

[4] E.g., App. 15a ("no reasonable juror could have found that Terbecki influenced Phelan's decision *such that* Phelan became a mere conduit for Terbecki's discriminatory bias") (emphasis added).

[5] Brief for Defendant-Appellee-Cross-Appellant, pp. 4, 20-26, 58.

requires blind reliance, the stuff of 'singular influence.'"[6]

> Courts in this Circuit and elsewhere routinely vacate jury verdicts where, as here, there was insufficient evidence that the decisionmaker was a mere "cat's paw" for a subordinate with discriminatory animus. *See, e.g., Staub*, 560 F.3d at 658.[7]
>
> [I]n cat's paw cases, the district court has an obligation ... to determine whether a reasonable jury would find that the non-decisionmaker had "singular influence" over the decisionmaker. *Staub*, 560 F.3d at 657.

In a second, separate argument Saks contended more broadly that "there was no evidence that Phelan was influenced by Terbecki."[8] The Eleventh Circuit relied on this first ground in affirming the decision of the district court.

> The district judge ... found that judgment was warranted because "no reasonable juror could conclude that in taking adverse employment action against Plaintiffs, Phelan acted as a mere [conduit] for Terbecki or Salerno's age animus or retaliatory motives."

---

[6] *Id.* at 20.

[7] *Id.* at 21.

[8] *Id.* at 31-41. Saks also argued on appeal that there was insufficient evidence that Salerno was biased against the plaintiffs because of their ages or their opposition to discrimination, or that Salerno had influenced the decisions of Phelan.

> *Perez v. Saks Fifth Avenue, Inc.*, 592 F.Supp.2d 1288, 1399-1400 (S.D.Fla. 2009). We ... conclude that the court properly granted judgment as a matter of law.

(App. 2a) (bracketed material in original).[9] The court of appeals did not address Saks' alternative argument that Terbecki did not influence Phelan at all.

On March 17, 2010, the court of appeals denied a timely petition for rehearing and rehearing en banc. (App. 26a).[10] On April 17, 2010, this Court granted certiorari in *Staub*. 2010 WL 1525785.

REASONS FOR GRANTING THE WRIT

Since the decision of the court of appeals in the instant case, this Court has granted certiorari in *Staub v. Proctor Hospital*, No. 09-400. The question presented in *Staub* is:

> In what circumstances may an employer be held liable based on the unlawful intent of

[9] The bracketed matter was inserted because of a typographical error in the district court opinion, which used the word "conduct" instead of "conduit."

[10] The petition urged that rehearing be granted in part to address the cat's paw doctrine. Petition for Panel Rehearing and Suggestion for Rehearing En Banc, at 11.

> officials who caused or influenced but did not make the ultimate employment decision?[11]

This Court's decision in *Staub* is likely to affect the disposition of the petition in the instant case. Accordingly, action on this petition should be deferred pending final action by this Court in *Staub*.

The lower courts in the instant case, like the Seventh Circuit in *Staub*, applied a highly demanding standard regarding the connection between a biased official and the action of the ultimate decisionmaker. A series of Eleventh Circuit decisions have held that in a case such as this an employer is only liable if the ultimate decisionmaker was a "mere conduit" for or a "cat's paw" of a biased official.[12]

---

[11] Petition for Writ of Certiorari, *Staub v. Proctor Hospital*, p. i.

[12] E.g., *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 2010 WL 675714 at *2 (11th Cir. 2010) ("mere conduit," "cat's paw"; citing *Stimpson*); *Dwyer v. Ethan Allen Retail, Inc.*, 325 Fed Appx. 755, 758 (11th Cir. 2009) ("mere conduit," "cat's paw"; citing *Stimpson*); *Shockley v. Healthsouth Central Georgia Rehab. Hospital*, 293 Fed.Appx. 742, 746 (11th Cir. 2008) ("mere conduit"; citing *Stimpson*); *Crawford v. Carroll*, 529 F.3d 961, 979 n.21 (11th Cir. 2008) ("mere conduit," "cat's paw," "rubber stamp"; citing *Stimpson*); *Malu v. City of Gainesville*, 270 Fed.Appx. 945, 949 (11th Cir. 2008) ("mere conduit," "cat's paw"; citing *Stimpson*); *Roberts v. Randstad North America, Inc.*, 231 Fed.Appx. 890, 895 (11th Cir. 2007); *Tucker v. Housing Authority of the Birmingham Dist.*, 229 Fed.Appx. 820, 822-23 (11th Cir. 2007) ("mere conduit," "cat's paw"; citing *Stimpson*); *Hampton v. City of South Miami*, 186 Fed.Appx. 967, 970 n.3 (11th Cir. 2006) ("mere conduit"; citing *Stimpson*); *Tucker v. Talladega City*

(Continued on following page)

The Eleventh Circuit's "conduit" or "cat's paw" standard is essentially the same as the "cat's paw" standard applied by the Seventh Circuit in *Staub*. 560 F.3d at 650, 655-56. The Eleventh Circuit's requirement that the ultimate decisionmaker be a "conduit" originated in a decision in that circuit that expressly relied on the seminal Seventh Circuit decision in this area of the law, which utilized that very term.[13] The Seventh Circuit itself has repeatedly described its own standard as requiring proof that the ultimate decisionmaker was a "conduit" for the motives of the biased official, which that circuit treats as synonymous with the "cat's paw" standard.[14] The Seventh and Eleventh Circuit standard requires a showing that the biased official so dominated the

---

Schools, 171 Fed.Appx. 289, 297 (11th Cir. 2006) ("mere conduit," "cat's paw"; citing *Stimpson*); *Quinn v. Monroe County*, 330 F.2d 1320, 1327 (11th Cir. 2003) ("mere conduit"; citing *Stimpson*); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999) ("mere conduit," "cat's paw," "rubber stamp"); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) ("mere conduit," "cat's paw," "rubber stamp").

[13] *Llampallas v. Mini Circuits, Lab, Inc.*, 163 F.3d at 1249 (citing *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990)).

[14] In seven decisions the Seventh Circuit has used "cat's paw" and "conduit" as synonymous terms for the same standard. *Long v. Teacher's Retirement System of Illinois*, 585 F.3d 344, 351 (7th Cir. 2009); *Jennings v. Illinois Department of Corrections*, 496 F.3d 764, 768 (7th Cir. 2007); *Phelan v. Cook County*, 463 F.3d 733, 784 (7th Cir. 2006); *Byrd v. Illinois Dept. of Public Health*, 423 F.3d 696, 705-06, 709-10 (7th Cir. 2005); *Schreiner v. Caterpillar, Inc.*, 250 F.3d 1096, 1101 (7th Cir. 2001); *Wills v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

decisionmaking process that the nominal ultimate decisionmaker was little more than a pawn of the biased manager. See, e.g., *Byrd v. Illinois Dept. of Public Health*, 423 F.3d 696, 708 (7th Cir. 2005) ("Although 'conduit' is not a defined word ... , we think the meaning is plain enough; if the employer simply rubber stamps a recommendation with illegal bias, the employer is liable for the harm caused"); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) ("rubber stamp[ ]").

Certiorari has been granted in *Staub* to determine whether that is the appropriate standard for resolving discrimination cases under federal employment statutes. If this Court in *Staub* rejects that type of stringent standard, the Eleventh Circuit should be directed to reconsider the instant case in light of the standard established by this Court in *Staub*.

In the instant case Saks has also argued, in the alternative, that there is insufficient evidence to support a jury finding that one or more biased Saks officials influenced the decision to fire the plaintiffs. The court of appeals did not address that contention. If this Court in *Staub* were to adopt a legal standard inconsistent with the "mere conduit" standard applied by the courts below, respondent would be free to renew on remand to the court of appeals its contention that it would be entitled to judgment as a matter of law under a less stringent standard.

CONCLUSION

For the above reasons, this Court should defer action on the petition pending the Court's decision in *Staub v. Proctor Hospital*.

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
schnapp@u.washington.edu
Seattle, WA 98195
(206) 616-3167

ERIKA DEUTSCH ROTBART
DEUTSCH ROTBART &
ASSOCIATES, P.A.
4755 Technology Way
Boca Raton, FL 33431
edrotbart@dralawfirm.com
(561) 361-8010

Attorneys for Petitioners

**Counsel of Record*

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-10574

D. C. Docket No. 07-21794-CV-KMM

LANA PEREZ, ELENA LEFFLER,

Plaintiffs-Appellants
Cross-Appellees,

versus

SAKS FIFTH AVENUE, INC.,
a foreign corporation,
doing business in Florida,

Defendant-Appellee
Cross-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(January 21, 2010)

Before WILSON and COX, Circuit Judges and RESTANI,* Judge.

PER CURIAM:

The district judge, in a well-reasoned order, granted Saks Fifth Avenue, Inc.'s renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). He found that the judgment was warranted because "no reasonable juror could conclude that in taking adverse employment action against Plaintiffs, Phelan acted as a mere [conduit] for Terbecki or Salerno's age animus or retaliatory motives." *Perez v. Saks Fifth Avenue, Inc.*, 592 F. Supp. 2d 1388, 1399-1400 (S.D. Fla. 2009). We have carefully reviewed the record and the court's order, and we conclude that the court properly granted judgment as a matter of law. We therefore affirm the judgment of the district court. As a result, Saks's conditional cross-appeal from the denial of its alternative motion for new trial pursuant to Federal Rules of Civil Procedure 50(b) and 59(a) is moot.

AFFIRMED.

---

* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 07-21794-CIV-MOORS/SIMONTON

LANA PEREZ and
ELENA LEFFLER,

Plaintiffs,

vs.

SAKS FIFTH AVENUE, INC.,
a foreign Corporation doing
business in Florida,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

THIS CAUSE came before the Court upon Defendant's Motion for Judgment as a Matter of Law (dkt # 179).

UPON CONSIDERATION of the Motion, the Responses, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

I. BACKGROUND

The facts of this case are set forth in this Court's Summary Judgment Order dated August 7, 2008 (dkt # 131). Trial was held and the jury returned a verdict in favor of Plaintiff Lana Perez ("Perez") for $370,000

and in favor of Plaintiff Elena Leffler ("Leffler") for $240,000. Special Verdict Form (dkt # 171).

II. ANALYSIS

Defendant Saks Fifth Avenue, Inc. ("Saks") contends that judgment as a matter of law is warranted because Plaintiffs failed to prove that age was a substantial motivating factor in the decision to suspend and terminate Plaintiffs. When ruling on a motion for judgment as a matter of law, a court must "consider all the evidence in the light most favorable to the non-moving party, and independently determine whether the facts and inferences point so overwhelmingly in favor of the movant . . . that reasonable people could not arrive at a contrary verdict." *Webb-Edwards v. Orange County Sheriff's Office*, 525 F.3d 1013, 1029 (11th Cir. 2008) (quoting *Johnson Enters. of Jacksonville, Inc, v. FPL Group, Inc.*, 162 F.3d 1290, 1308 (11th Cir. 1998)) (internal quotation marks and citation omitted). The court must "affirm the jury verdict unless there is no legal basis upon which the jury could have found for the [non-moving parry]." *Telecom Technical Servs. Inc. v. Rolm Co.*, 388 F.3d 820, 830 (11th Cir. 2004).

The Parties agree that the decision to terminate Plaintiffs was made by Margaret Phelan ("Phelan"), the Regional Director of Human Resources for Saks, but disagree as to whether her decision was impermissibly influenced by the age based animus of others. Allegations that a neutral decision maker was

influenced by the age animus of others, such that the decision maker becomes a mere conduit for the discriminatory bias of another, is sometimes known as the "cat's paw" theory. *See Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999). Plaintiffs' case proceeded upon the theory that Raymond Terbecki ("Terbecki"), Plaintiffs' manager, and Gloria Salerno ("Salerno), Director of Human Resources for Saks at the Bal Harbour store, both harbored age animus towards Plaintiffs, and that Terbecki and Salerno impermissibly influenced Phelan's decision to suspend and terminate Plaintiffs.

A. Age Based Animus

1. Age Based Animus by Terbecki

A reasonable juror could have found that Terbecki harbored age based animus towards Plaintiffs. Perez testified that Terbecki called her "harried," told her that "you look like my father," and stated that he was going to move her to the back room because she was "old." 9/22 Trial Tr. at 111, 115, 126. Plaintiffs also testified that they were denied professional opportunities by Terbecki, which were instead given to younger employees and that younger employees were favored. *See* 9/22 Trial Tr. at 122-125, 201; 9/23 Trial Tr. at 42, 59. This evidence is sufficient to support a finding that Terbecki harbored age based animus.

2. Age Based Animus by Salerno

A reasonable juror could not have found that Salerno harbored age based animus towards Plaintiffs. Salerno worked for Saks at Bal Harbour from July of 2005 to April of 2006. 9/19 Trial. Tr. at 15. Terbecki testified that he and Salerno worked in conjunction when making hiring decisions in the Contemporary Department. 9/15 Trial Tr. at 104-05, 178. Terbecki also testified that during the time that both he and Salerno worked for Saks, 11 employees were hired into the Contemporary Department, all of whom were under the age of 40. 9/15 Trial Tr. at 188-22. No evidence was presented concerning the number of employees that applied for these positions or the ages of the applicants, given that the age of an applicant is unknown until the applicant is hired. The Contemporary Department had 12 to 15 employees, including Terbecki. 9/15 Trial Tr. at 103. The Saks store at Bal Harbour had approximately 250 employees. 9/19 Trial Tr. at 82. Salerno also participated in hiring employees for other departments. *Id.* at 32. From July of 2005 to April of 2006, 58 employees were hired at the Bal Harbour store, approximately one-third of whom were between the ages of 40 and 72. *Id.* at 130; Pl.s' Ex. 48. Salerno's assistants in Human Resources were both over the age of 40. 9/19 Trial Tr. at 129.

"Statistics can be an important source of proof in employment discrimination cases, since 'absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a

work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.'" *Peightal v. Metro. Dade County,* 26 F.3d 1545, 1553 (11th Cir. 1994) (quoting *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 307 (1977)). "'[S]tatistics . . . come in infinite variety. . . . [T]heir usefulness depends on all the surrounding facts and circumstances,'" *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 870 (11th Cir. 1986) (quoting *Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 311-12 (1977)).

Here, the hiring of 11 employees under the age of 40 into the Contemporary Department from July of 2005 to April of 2006 is, without more, insufficient to enable a reasonable juror to conclude that Salerno harbored age animus towards Plaintiffs. This hiring data, while not irrelevant, is simply too narrow in time, scope and substance to reasonably support a finding of age animus by Salerno. This is so because of: 1) the short time period during which the 11 Contemporary Department associates were hired; 2) the 12 to 15 employees in the Contemporary Department comprised only a small percentage of the Bar Harbour store's total employees; 3) approximately one-third of the employees hired during Salerno's tenure were over the age of 40; 4) Salerno was involved in hiring for the entire Bal Harbour store; 5) hiring in the Contemporary Department comprised less that [sic] twenty percent of total hiring during Salerno's tenure; 6) Salerno was not solely responsible for the recruiting and hiring of

Contemporary Associates; and 7) the absence or unavailability of evidence concerning the number of applicants to the Contemporary Department during the relevant period. *See* 9/15 Trial Tr. at 103-05, 178. The fact that the Contemporary Department's first two hires after Plaintiffs were terminated were under the age of 40 adds nothing to the analysis. Salerno did not participate in their hiring and thus their hiring is not indicative of any age animus by Salerno.[1] Accordingly, while the Contemporary Department's hiring data during Salerno's tenure is not wholly irrelevant, when viewed in the context of the Bal Harbour store's overall hiring data, no reasonable juror could rely on the hiring data to conclude that Salerno harbored age animus, either towards Plaintiffs or generally.

Plaintiffs also presented evidence that Deborah Slack ("Slack"), the Store Manager for Saks at Bal Harbour, emailed Salerno stating that with respect to "[f]illing the St. John position assigned sales associate, younger is a priority." 9/19 Trial Tr. at 242-43. Slack testified that "younger" referenced attitude and not age. *Id.* at 243-44. The person hired to fill the St.

---

[1] After Plaintiffs were terminated, the next two hires in the Contemporary Department were Amber Hendrickson, hired April 25, 2006, and Lauren Massaro, hired June 6, 2006. Pl.s' Ex. 48. Sell area 24 in Plaintiffs' Exhibit 48 denotes the Contemporary Department. *See* 9/19 Trial Tr. at 36-37. Salerno left Saks in April of 2005 and testified that she likely did not assist with hiring employees who were hired on April 25, 2006. *Id.* at 33-34.

John position, Rosalie Borg ("Borg"), was 71 years of age. *Id.* at 129-30. This statement could lead a reasonable juror to conclude that Slack was instructing Salerno to take age into account in hiring for the St. John position, which could itself support the inference that Slack could have considered age to be a priority with respect to other employment opportunities within the store. However, based on the fact that Borg, age 71, ultimately filled the position, Salerno either ignored Slack's instruction or did not understand Slack's comment concerning younger as a priority to have been made in reference to age. Therefore, Slack's comment to Salerno cannot reasonably support a finding of age based animus on the part of Salerno.

Plaintiffs testified that they attended a meeting which was also attended by Salerno, Terbecki and two other associates. 9/22 Trial Tr. at 131. Perez testified that during the meeting, which was convened to address issues occurring between associates on the floor of the Contemporary Department, Salerno became angry and yelled "don't you cross my door again." *Id.* at 132. However, Salerno's behavior and statements at this meeting do not constitute evidence of discriminatory bias because the sales associates in attendance were both over and under the age of 40. 9/15 Trial Tr. at 119, 154. Moreover, the reason for the meeting, and the subject of Salerno's comment, related to the operation of the Contemporary Department, and was unrelated to age or the issue of age discrimination. Therefore, no reasonable juror could

conclude that Salerno's statement is evidence of age animus or retaliation because the statement had no connection with, and made no reference to, the age of any employee. Furthermore, Plaintiffs' claims that they were denied the opportunity to act as representatives of various clothing lines is not evidence of age based animus by Salerno because no evidence was presented that Salerno had any responsibility over, or involvement with, the assignment of clothing lines to sales associates.

Perez reported Terbecki's comment that he was going to move her to the back room because of her age to Mindy Curtis ("Curtis") and Salerno in Human Resources, stating that it constituted age discrimination. 9/22 Trial Tr. at 119-21. Perez testified that Salerno did not agree that any age discrimination had occurred and that Perez was unaware of any action taken pursuant to her complaint against Terbecki. *Id.* at 120-21. However, Perez was never moved to the back room. *Id.* at 40. Perez also testified that she did not have any interactions with Salerno prior to that meeting. *Id.* at 116. Shortly thereafter, Salerno sent Curtis and Terbecki an email stating that they needed to discuss the fact that Perez "needs to be written up for leaving on Saturday and if she has not shown up on Sunday and today, then it would be considered job abandonment." 9/19 Trial Tr. at 41; Pl.s' Ex. 3. Terbecki responded stating that Perez had worked on Sunday. *Id.*

In light of the surrounding facts and circumstances concerning Salerno's disagreement with Perez

that age discrimination had occurred, there is insufficient evidence for a reasonable juror to conclude that Salerno harbored age animus. The theory that Salerno harbored age based animus based on her failure to acknowledge to Perez that Terbecki acted in a discriminatory fashion is premised on the notion that it is always reasonable to conclude that inaction by a third party in response to an allegation of age discrimination constitutes age discrimination on the part of the third party to whom the claim is conveyed. While this might be true in some instances, the reasonableness of such a conclusion necessarily depends on surrounding facts and circumstances. Therefore, it is not inevitably true that in every case in which a human resources employee fails to acknowledge an allegation of age discrimination committed by a third party, such failure to acknowledge may always be reasonably attributed to age based animus.

Here, there was no prior relationship, adverse or otherwise, between Salerno and Perez that would suggest a likelihood of age animus by Salerno towards Perez. No evidence was presented that Salerno had been indifferent to other claims of any form of discrimination by other Saks' employees in the past. Nor did the evidence indicate that Salerno and Terbecki had any type of special relationship that would have motivated Salerno to shield Terbecki from Perez's complaints or to adopt Terbecki's age animus. Salerno's failure to address Perez's complaints in a way that satisfied Perez does not constitute direct or

meaningful circumstantial evidence that Salerno harbored age animus towards Perez. Nor does the evidence reasonably support the conclusion that Salerno was indifferent to Perez's claims because Salerno responded to Perez's claim by ensuring that Perez was not moved to the back room. 9/19 Trial Tr. at 39. Salerno also discussed the issue with Terbecki. *Id.* No evidence was presented that Leffler made a discrimination claim to Salerno or that Salerno was indifferent to such a claim.[2] Therefore, no reasonable juror could find that Salerno harbored age based animus towards Plaintiffs based on Salerno's response to Perez's claims of discrimination by Terbecki. To find otherwise would give rise to a de facto presumption of age based animus on the part of a human resources employee whenever the human resources employee fails to respond to an employee's discrimination claim, or to acknowledge the claim, in a way that satisfies the complainant.

Plaintiffs also went to great lengths at trial to prove that Plaintiffs received brand filtering or empowerment training in which they were taught that they had discretion to authorize discounts and that Saks had no written discount policy defining an

---

[2] Leffler testified that she complained to Human Resources that Terbecki had called her a shark, in reference to her aggressive sales tactics. 9/23 Trial Tr. at 42-45. However, no reasonable juror could conclude that this comment was related to, or based upon, age animus. Furthermore, Defendant's objections to Plaintiffs' attempts to elicit testimony concerning Leffler's comments to Noel Sugrue were sustained. *Id.* at 50-51.

unauthorized discount. While this may be evidence that Plaintiffs' were unfairly suspended and terminated, it is not evidence of age animus by Salerno or that Saks' stated reason for taking adverse employment action against Plaintiffs was merely pretextual. Even though Plaintiffs believed they were empowered to give discounts based on training they received at Saks, this does not support an inference of age animus by Salerno because there is no logical relationship between Plaintiffs' subjective belief as to the appropriateness of their conduct and Salerno's sentiment as to the respective ages of Plaintiffs. No evidence was presented that Salerno attended the brand filtering training, that she had any knowledge of information from the training related to discounts, or that she had general knowledge about the use of unauthorized discounts by other Contemporary Department associates. Nor does the empowerment training and lack of a definition for unauthorized discounts bear any relation to the likelihood that Salerno influenced Phelan's decision to terminate Plaintiffs. Therefore, the evidence concerning the empowerment training and Saks' discount policy bears primarily on the fairness of Plaintiffs' termination, an issue not before the jury at trial. Accordingly, evaluating the evidence in its entirety, no reasonable juror could conclude that Salerno harbored age animus towards Plaintiffs or that Plaintiffs' suspension and termination was retaliatory.

B. "Cat's Paw" Theory

1. Terbecki's Influence on Phelan's Decision to Suspend and Terminate Plaintiffs

Plaintiffs bore the burden of proving that Terbecki or Salerno influenced Phelan to take adverse employment action against Plaintiffs because of age based animus or retaliatory motives, such that Phelan was a mere conduit for the discriminatory bias or retaliatory motives of Terbecki or Salerno. However, Terbecki never had contact with Phelan concerning the Asset Protection Department's investigation of Plaintiffs or the suspension and termination of Plaintiffs. 9/16 Trial Tr. at 14-15. Nor did Terbecki participate in, or initiate, the Asset Protection's investigation. 9/16 Trial Tr. at 59-60; 9/17 Trial Tr. at 26. No evidence to the contrary was presented. Without having participated in the Asset Protection investigation and in the absence of any contact with Phelan, Terbecki could not have influenced Phelan's ultimate decision to terminate Plaintiffs or skewed the results of the Asset Protection investigation to influence Phelan's decision.[3] There is no evidence in

[3] Plaintiffs' intimation that Terbecki initiated the Asset Protection investigation was unsupported by any evidence. *See* 9/22 Trial Tr. at 224. Plaintiffs are not entitled to inferences drawn in their favor based on testimony constituting unsupported speculation. *See Lloyd v. Card*, 283 Fed. Appx. 696, 701 (11th Cir. 2008) (stating that inferences based on speculation are not reasonable) (citing *Marshall v. City of Cape Coral, Fla.*, 797 F.2d 1555, 1559 (11th Cir. 1986)). While evidence was presented that Terbecki initiated Salerno's investigation by

(Continued on following page)

the record that Terbecki used any other means of influencing Phelan's decision to terminate Plaintiffs. Therefore, even though a reasonable juror could have concluded that Terbecki harbored age animus, no reasonable juror could have found that Terbecki influenced Phelan's decision such that Phelan became a mere conduit for Terbecki's discriminatory bias or retaliatory motives.

2. Salerno's Influence on Phelan's Decision to Suspend and Terminate Plaintiffs

Plaintiffs presented insufficient evidence at trial for a reasonable juror to conclude that Salerno harbored age animus. However, assuming, *arguendo,* that Salerno maintained discriminatory bias against Plaintiffs, there was insufficient evidence for a reasonable juror to conclude that Salerno influenced Phelan's decision to terminate Plaintiffs such that Phelan was a mere conduit for Salerno's age animus or retaliatory motives. On March 16, 2006, Terbecki sent Salerno an email notifying her that a sales associate had given him a receipt indicating that Leffler had given an unauthorized discount. 9/19 Trial Tr. at 61. Salerno responded to Terbecki by asking him to review other receipts to determine if Leffler had made other unauthorized discounts. *Id.* at

---

providing her with a receipt, that investigation never yielded any results because Terbecki did not conduct the review of Plaintiffs' sales and refunds as Salerno requested.

62; Pl.s' Ex. 16. Salerno notified Phelan of the receipt and told Phelan that she was in the process of determining how many times Leffler had given unauthorized discounts in the last month. 9/16 Trial Tr. at 154-55. Terbecki never investigated Plaintiffs' sales and refunds and did not provide Salerno with any other receipts. 9/19 Trial Tr. at 61-62. On March 21, 2006, Salerno sent Phelan an email stating that Salerno had a number of issues to discuss with her, including Leffler's unauthorized discounts. *Id.* at 155-56; Pl.s' Ex. 17. Phelan responded that she did not have time to discuss the issues at that time but that they would speak the next day. *Id.* at 156. Neither party recalled the specifics of any conversation that occurred the following day concerning Leffler's discounts. *Id.* at 157; 9/19 Trial Tr. at 72.

On March 24, 2006, Jennifer Hanno ("Hanno"), Asset Protection Manager at the Bal Harbour Store, sent an email to Salerno notifying Salerno of the investigation Asset Protection had been conducting since December of 2005 concerning Plaintiffs' unauthorized discounts and refunds. 9/17 Trial Tr. at 23; Pl.s' Ex. 18. The email contained an attached spreadsheet providing the results of the investigation. Pl.s' Ex. 18. On March 25, 2006, Salerno sent an email to Phelan which included the spreadsheet and stated that "[a]s per our discussion yesterday, Lana Perez and Elena Leffler have been doing this together." Pl.s' Ex. 18. Salerno did not recall the specifics of the conversation referenced in the email. 9/17 Trial Tr. at 75. Plaintiffs were suspended on

April 3, 2006. 9/16 Trial Tr. at 173-74. Phelen [sic] subsequently terminated Plaintiffs for giving unauthorized discounts and refunds. 9/16 Trial Tr. at 160, 163.

No reasonable juror could conclude, based on the evidence presented, that Salerno influenced Phelan's decision to terminate Plaintiffs such that Phelan became a mere conduit for Salerno's age animus or retaliatory motives. Although Salerno instructed Terbecki to review Plaintiffs' sales and refund activities, Terbecki never complied with Salerno's instruction. Therefore, Salerno was not privy to any information concerning Plaintiffs' sales and refund practices prior to receiving Hanno's March 24, 2006 email, except for the receipt she received from Terbecki. Moreover, Salerno's comment that "Lana Perez and Elena Leffler have been doing this together," which Salerno wrote when she forwarded Hanno's March 24th email and spreadsheet to Phelan, is insufficient to demonstrate that Salerno influenced Phelan's decision because it merely reiterated Hanno's findings. Pl.s' Ex. 18.

There is evidence that Salerno spoke with Phelan concerning Plaintiffs' sales and refund activities at least once between March 21 and March 24, 2006. 9/19 Trial Tr. at 155-57; Pl.s' Ex 18. However, again assuming that Salerno harbored age animus towards Plaintiffs, no evidence was presented about the nature of any discussion between Salerno and Phelan during that time period. Speculation concerning the substance of such a conversation, beyond its general

subject matter, is therefore unwarranted. The mere fact that Salerno and Phelan discussed Plaintiffs' sales and refund activities is insufficient evidence upon which a juror could reasonably rely to conclude that Salerno availed herself of the opportunity to persuade Phelan to take adverse employment action against Plaintiffs because of discriminatory bias. Moreover, the evidence indicates that the conversation or conversations between Salerno and Phelan concerning Plaintiffs occurred between March 21 and March 24, 2006. Even if speculation concerning the substance of such conversations was warranted, it is unclear what information Salerno could have relied on to convince Phelan to take adverse employment action against Plaintiffs because Terbecki never conducted a review of Plaintiffs' sales and refunds and Salerno had not yet received notice of the Asset Protection investigation or its results. In the absence of evidence substantiating an attempt by Salerno to convince Phelan to take adverse employment action against Plaintiffs that relies on more than unsupported speculation, no reasonable juror could conclude that, in suspending and terminating Plaintiffs, Phelan acted as a mere conduit for Salerno's age based animus or retaliatory motives.

Furthermore, the evidence that the Asset Protection investigation was closed and subsequently reopened could not lead a reasonable juror to conclude that Salerno influenced Phelan's decision to suspend and terminate Plaintiffs. Hanno was unaware of Salerno's efforts in March of 2005 to review

Plaintiffs' sales and refunds. 9/17 Trial Tr. at 72. Nonetheless, Asset Protection commenced its own investigation of Plaintiffs' sales and refunds in December of 2005.

The investigation was initiated based on a tip from Christine Ta, a sales associate in the Contemporary Department.[4] 9/17 Trial Tr. at 23. This investigation continued until March of 2006. On January 23, 2006, Megan Phillips ("Phillips"), a Saks corporate investigator, sent an email to Hanno concerning the investigation of Plaintiffs, stating that "if there is no activity or anything substantial to go on, let's close these investigations." *Id.* at 51. Phillips also made a notation in APIS, a system used by Asset Protection, indicating that she closed the investigation due to inactivity. *Id.* at 68-69. Hanno testified

---

[4] Alex Freixa ("Freixa"), the Saks Asset Protection Supervisor, testified that the investigation into Plaintiffs' sales and refund practices was initiated because of excessive discounts that appeared in regular daily reports produced by Asset Protection. 9/23 Trial Tr. at 229-31. There is therefore some inconsistency between the testimony of Hanno and Freixa as to whether the investigation of Plaintiffs was initiated by a tip from a sales associate or by anomalies that appeared on certain daily reports. However, this inconsistency is not evidence that Terbecki or Salerno was actually responsible for initiating the Asset Protection investigation. Such a conclusion is unreasonable because it would require unsupported speculation and is therefore an inference to which Plaintiffs are not entitled. *See Lloyd v. Card*, 283 Fed. Appx. 696, 701 (11th Cir. 2008) (stating that inferences based on speculation are not reasonable) (citing *Marshall v. City of Cape Coral, Fla.*, 797 F.2d 1555, 1559 (11th Cir. 1986))

that Phillips was not involved with the investigation when the January 23, 2006, email was sent and that Phillips did not know the status of the investigation. *Id.* Hanno also testified that the investigation should not have been closed and was reopened shortly thereafter. *Id.* at 69.

Plaintiffs presented no evidence that Terbecki or Salerno took any action to initiate the Asset Protection investigation in December of 2005 or that they were aware of the investigation prior to March of 2006. No non-speculative evidence was presented that Phillips terminated the investigation of Plaintiffs because it had actually been concluded with no adverse findings. Nor was any non-speculative evidence presented that Terbecki or Salerno played a role in reopening the Asset Protection investigation. Therefore, the fact that the Asset Protection investigation was closed and later reopened is not evidence that Salerno influenced Phelan to take adverse employment action against Plaintiffs.

Furthermore, the fact that Phelan did not conduct another independent investigation after receiving the results of the Asset Protection investigation from Hanno is of no moment because there is no non-speculative evidence that Phelan relied on anything other than Hanno's investigation results and its fruits in reaching her decision to suspend and terminate

Plaintiffs.[6] *See* 9/16 Trial Tr. at 159. Nor is there any evidence that the Asset Protection investigation was tainted by age animus. Therefore, Phelan relied on the results of an independent investigation and no additional investigation by Phelan was necessary to dispel suspicion of discriminatory bias.

Nor is it significant that Salerno did not advise Phelan of all information related to Plaintiffs' employment history at Saks, particularly information inapposite to Plaintiffs' sales and refund practices. That Salerno did not apprise Phelan of Plaintiffs' entire employment history at Saks, including prior claims of discrimination against a third party, provides no reasonable basis for concluding that Salerno withheld information from Phelan due to age animus. This is because no evidence was presented that Salerno failed to disclose information that could reasonably have been expected to alter Phelan's decision. Even if Phelan had known that Perez had complained of age discrimination by Terbecki, there is no rationale that suggests how this information might have altered Phelan's decision or how Salerno could have benefitted by not disclosing it, especially because Perez's discrimination claim was against Terbecki, not Salerno.

---

[6] The Asset Protection investigation led to the notes of Hanno's interviews with Plaintiffs and the resulting written statements. Pl.s' Exs. 67, 68; Def.'s Exs. 21, 41.

Plaintiffs' evidence of disparate treatment between Plaintiffs and David Algarin ("Algarin") does not support their claims of discrimination and retaliation. In a case alleging age animus by a decision maker, disparate treatment of a comparator is relevant because it gives rise to the inference that the stated reason for taking the adverse employment action was pretextual. *See Silvera v. Orange County School Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001). In a "cat's paw" case, an inference of pretext from disparate treatment only arises if a non-decision maker harboring age animus influenced the decision maker to take adverse employment action against a Plaintiff while taking less severe or no adverse employment action against the comparator. However, without other evidence that a non-decision maker influenced the decision maker's adverse employment action, no inference of pretext is warranted. When no animus is alleged on the part of the decision maker, the absence of evidence of influence by the non-decision maker on the decision maker's adverse employment action makes it impossible for disparate treatment to serve as independent evidence of age animus by the non-decision maker because there is no nexus between the disparate treatment and the non-decision maker accused of discriminatory bias. Likewise, evidence of disparate treatment cannot itself serve as evidence that the decision maker was influenced by a non-decision maker with discriminatory bias. While disparate treatment may suggest animus on the part of a decision maker, it does not inherently suggest that a neutral decision maker must have been influenced

by a third party. Therefore, in a "cat's paw" case, disparate treatment cannot serve as evidence that a non-decision maker harbored discriminatory bias or that the decision maker acted as a conduit for the non-decision maker's age animus, absent other evidence suggesting that the disparate treatment was influenced by a non-decision maker.

For disparate treatment of Algarin to be relevant here, Plaintiffs must have presented other evidence that Terbecki or Salerno influenced Phelan to take adverse employment action against Plaintiffs, such that Phelan became a conduit for Terbecki or Salerno's discriminatory bias or retaliatory motives. Plaintiffs presented insufficient evidence for a reasonable juror to conclude that Phelan acted as a conduit for Salerno's age animus or retaliatory motives or that Salerno harbored age animus towards Plaintiffs. Furthermore, no evidence was presented that Terbecki influenced Phelan's decision to terminate Plaintiffs in such a way that Phelen [sic] was merely the "cat's paw" for Terbecki's discriminatory bias or retaliatory motives. Therefore, Plaintiffs evidence of disparate treatment does not support their claims of "cat's paw" liability.

Taking the evidence as a whole and viewing it in its aggregate, a reasonable juror could conclude that Terbecki harbored age animus towards Plaintiffs. However, no reasonable juror could rely on the accumulation of all evidence presented at trial to conclude that Salerno harbored age animus towards Plaintiffs or maintained age based discriminatory bias in

general. Furthermore, no reasonable juror could conclude that in taking adverse employment action against Plaintiffs, Phelan acted as a mere conduct [sic] for Terbecki or Salerno's age animus or retaliatory motives.

III. CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendant's Motion for Judgment as a Matter of Law (dkt # 179) is GRANTED. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th day of January, 2009.

/s/ K M Moore
K. MICHAEL MOORE
UNITED STATES
DISTRICT JUDGE

cc: All counsel of record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-10574-FF

LANA PEREZ,
ELENA LEFFLER,

Plaintiffs-Appellants
Cross-Appellees,

versus

SAKS FIFTH AVENUE, INC.,
a foreign corporation,
doing business in Florida,

Defendant-Appellee
Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Mar. 17, 2010)

Before: WILSON and COX, Circuit Judges and RESTANI,* Judge.

PER CURIAM:

The Petition(s) for Rehearing are **DENIED** and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are **DENIED**.

ENTERED FOR THE COURT:

/s/

UNITED STATES
CIRCUIT JUDGE

* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

Supreme Court, U.S.
FILED
AUG 17 2010
OFFICE OF THE CLERK

No. 09-1535

In the Supreme Court of the United States

LANA PEREZ AND ELENA LEFFLER,
PETITIONERS

v.

SAKS FIFTH AVENUE, INC.,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

EDWARD A. BRILL
Counsel of Record
REBECCA L. BERKEBILE
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
212.969.3000
ebrill@proskauer.com

Counsel for Respondent

QUESTIONS PRESENTED

Should the Court defer action on this petition pending the Court's decision on the proper standard for "cat's paw" liability in *Staub v. Proctor Hospital*, No. 09-400, even though (i) Petitioners never challenged the "mere conduit" standard below and argued for that standard in the Eleventh Circuit, and (ii) the Eleventh Circuit decision would not change if this Court sets a different standard in *Staub*?

CORPORATE DISCLOSURE STATEMENT

As required by Supreme Court Rule 29 6, Respondent Saks Fifth Avenue, Inc states as follows

1. Saks Fifth Avenue, Inc is a nongovernmental corporation.

2 Saks Fifth Avenue, Inc 's parent corporation is Saks & Company

3 No publicly-held corporation owns 10% or more of Saks Fifth Avenue, Inc 's stock However, Saks Fifth Avenue, Inc is an indirect subsidiary of Saks Incorporated, a publicly traded corporation Based on publicly available documents, BlackRock, Inc. and its affiliates own more than 10% of Saks Incorporated's stock

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 2

I. Discussion of Cat's Paw Liability Standard in the District Court 3

II. Discussion of Cat's Paw Liability Standard in the Eleventh Circuit 5

REASONS FOR DENYING THE PETITION 6

I. Petitioners Are Precluded From Seeking Review of the Cat's Paw Liability Standard 7

II. The Decision Below Would Not Change Under a Different Standard for Cat's Paw Liability 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Delta Air Lines, Inc. v. August,
450 U.S. 346 (1981) 7

New Hampshire v. Maine,
532 U.S. 742 (2001) 7

Pegram v. Herdrich,
530 U.S. 211 (2000) 8

Rita v. United States,
551 U.S. 338 (2007) 7

Sprietsma v. Mercury Marine,
537 U.S. 51 (2002) 7

Staub v. Proctor Hospital,
No. 09-400 (2010) 2, 6, 8

Tucker v. Housing Authority,
229 F. App'x 820 (11th Cir. 2007) 3

In the Supreme Court of the United States

LANA PEREZ AND ELENA LEFFLER,
PETITIONERS

v.

SAKS FIFTH AVENUE, INC.,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

Respondent Saks Fifth Avenue, Inc. (Saks) respectfully submits this opposition to petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

Petitioners now dispute for the first time the appropriate standard to hold an employer liable based on unlawful intent of someone who influenced, but did not make, an ultimate employment decision ("cat's paw" liability). Petitioners never questioned the standard for cat's paw liability in the district court, and, in fact, argued that the district court's

standard was the appropriate one for the Eleventh Circuit to apply.

The precise standard for cat's paw liability never became an issue in the district court. The court did not analyze what the appropriate standard was because it found that Saks would not be liable under any standard, as there was no evidence of any influence by a biased subordinate over the decisionmaker. The Eleventh Circuit affirmed this decision.

Thus, this Court should deny the petition because Petitioners accepted – and even endorsed – the "mere conduit" standard in the district court and Eleventh Circuit. Moreover, there is no reason to defer action on the petition pending the Court's decision in *Staub v. Proctor Hospital*, No. 09-400, as the decision below would be the same regardless of what cat's paw liability standard the Court adopts in *Staub*.

STATEMENT

Saks terminated the employment of Petitioners, who had been salespeople in one of Saks's Florida stores, after an internal investigation revealed that they were giving unauthorized discounts to customers to increase their sales and commissions, and they were approving improper merchandise returns. Petitioners claimed their employment was terminated because of age discrimination and retaliation, and a trial was held on this issue in the United States District Court for the Southern District of Florida. After the jury returned a verdict for Petitioners, the district court granted Saks's motion for judgment as a matter of law. (Pet. App. 3a-24a) The Court of Appeals affirmed the district court's "well-reasoned order" in a brief per curiam order. (Pet. App. 2a)

I. Discussion of Cat's Paw Liability Standard in the District Court

Petitioners never questioned the "mere conduit" standard for cat's paw liability in any of the district court proceedings. The district court judge instructed the jury as follows:

> If a person harboring age animus succeeds in influencing the final decision-maker into taking the challenged adverse employment action based on false information or information which would otherwise not be an adequate basis for the adverse employment action, then the adverse employment action is attributable to the person harboring age animus, even though he or she did not make the final decision. In such a case, the final decision-maker is a *mere conduit* for the discriminatory bias of the person harboring age animus.

(emphasis added). Neither Petitioners nor Saks objected to this instruction. In fact, in Petitioners' proposed jury instructions, they requested that the district court instruct the jury that Saks could be liable where "the ultimate decision-maker is a mere conduit for the harasser's discriminatory bias."

Following the jury verdict, Saks made a renewed motion for judgment as a matter of law. In Plaintiffs' Opposition to Defendant's Renewed Motion for Judgment as a Matter of Law, Petitioners accepted the "mere conduit" standard, citing *Tucker v. Housing Authority*, 229 F. App'x 820, 823 (11th Cir. 2007), for the proposition that the cat's paw theory requires a showing that "the recommender is using the decision-maker as a mere conduit, or 'cat's paw' to give effect to the recommender's discriminatory animus."[1]

---

[1] The only argument Petitioners made concerning the cat's paw standard in the district court concerned whether a decisionmaker (continued)

The district court granted Saks's renewed motion for judgment as a matter of law. The court analyzed at length Petitioners' argument that although there was no evidence that the individual who actually terminated Petitioners (Margaret Phelan) harbored discriminatory animus or had a motive to retaliate, she was impermissibly influenced by two other people who held age-based animus or a motive to retaliate. The district court found that there was insufficient evidence for a reasonable juror to conclude that one of these two individuals (Gloria Salerno) harbored animus or a retaliatory motive, which made the sole question whether the other individual (Raymond Terbecki) influenced Phelan's decision to terminate Petitioners.

The district court concluded that Phelan's decision to terminate Petitioners was based solely on an independent investigation conducted by the store's Asset Protection Department, which Terbecki did not participate in or initiate. (Pet. App. 14a) The district court found:

> Terbecki never had contact with Phelan concerning the Asset Protection Department's investigation of Plaintiffs or the suspension and termination of Plaintiffs. Nor did Terbecki participate in, or initiate, the Asset Protection's investigation. No evidence to the contrary was presented. Without having participated in the Asset Protection investigation and in the absence of any contact with Phelan, *Terbecki could not have influenced Phelan's ultimate decision to terminate Plaintiffs* or skewed the results of the Asset Protection investigation to influence Phelan's decision. *There is no evidence*

---

must conduct an independent evaluation of the termination decision to escape being a mere conduit for another person's discriminatory animus.

> *in the record that Terbecki used any other means of influencing Phelan's decision to terminate Plaintiffs*

(Pet. App. 14a-15a) (internal citations omitted) In fact, the district court repeatedly emphasized that there was no evidence that Terbecki asserted any influence over Phelan's decision to terminate Petitioners. (Pet. App. 14a, 15a, 22a, 23a)

Having found that there was no evidence that Terbecki had any influence on the decision to terminate Petitioners, the district court did not analyze the standard for how much influence someone with discriminatory animus must exert over a decisionmaker to find that the decisionmaker was acting as the "cat's paw" for the discriminating actor. The district court noted that the standard is whether Phelan was a "mere conduit for the discriminatory bias or retaliatory motives" of Terbecki, but the court did not attribute any practical import to the "mere conduit" standard, as it found Terbecki did not influence Phelan's decision in *any* way at all.[2]

II. Discussion of Cat's Paw Liability Standard in the Eleventh Circuit

On appeal to the Eleventh Circuit, Petitioners did not dispute the "mere conduit" standard. To the contrary, in re-

---

[2] With respect to Salerno, the district court explained at great length why "no reasonable juror could conclude that Salerno harbored age animus towards Plaintiffs or that Plaintiffs' suspension and termination was retaliatory." (Pet. App. 13a) The district court concluded that, even assuming *arguendo* that Salerno maintained discriminatory bias against Plaintiffs, there was an "absence of evidence substantiating an attempt by Salerno to convince Phelan to take adverse employment action against Plaintiffs that relies on more than unsupported speculation . . . ." (Pet. App. 18a)

sponse to Saks's argument for a more restrictive cat's paw liability standard, Petitioners strongly objected, arguing, "Saks did not object to this instruction [on the mere conduit standard] and it is the law of the case." Petitioners asserted that the Eleventh Circuit should apply the "mere conduit" standard for assessing cat's paw liability, noting in their Eleventh Circuit brief that one is a cat's paw if he is "a conduit for imputation of discriminatory animus." In the many pages Petitioners devoted in their Eleventh Circuit briefs to the subject of cat's paw liability, not once do they dispute the use of the "mere conduit" standard.

The Eleventh Circuit affirmed the district court's decision in a one paragraph per curiam decision in which it explained that it agreed with the district judge's "well-reasoned order." (Pet. App. 2a) Although the Eleventh Circuit quoted the "mere conduit" language included in the district court decision, there is no indication that the Eleventh Circuit relied on this standard in reaching its decision, or that it was avoiding decision on the supposed separate issue of whether Terbecki influenced Phelan's decision at all.

After the Eleventh Circuit issued its decision, this Court granted certiorari in *Staub*, which deals with the proper standard for cat's paw liability. Following the grant of certiorari in *Staub*, Petitioners raised for the first time in their petition for a writ of certiorari the issue of whether the lower courts used the proper standard for cat's paw liability in this case.

REASONS FOR DENYING THE PETITION

This Court should deny the petition and not defer action because (i) Petitioners are precluded from raising the issue of the cat's paw liability standard, as they never challenged the "mere conduit" standard below, and are estopped from arguing against the very standard that they advocated for in the Eleventh Circuit, and (ii) even if this Court sets a different

standard in *Staub*, it would not change the decision in this case.

I. Petitioners Are Precluded From Seeking Review of the Cat's Paw Liability Standard

Petitioners are barred from seeking review by this Court of the appropriate standard for cat's paw liability. Petitioners (i) did not object to the district court's jury instruction providing the "mere conduit" standard, and in fact requested the jury be instructed on the "mere conduit" standard, (ii) did not object to the "mere conduit" standard in opposing Saks's renewed motion for judgment as a matter of law, and (iii) did not object to the "mere conduit" standard in the Eleventh Circuit, instead arguing that this was the appropriate standard the Eleventh Circuit should adopt.

Petitioners never argued against the "mere conduit" standard in the district court or the Eleventh Circuit. *See Rita v. United States*, 551 U.S. 338, 360 (2007) (issues not raised below will not be considered by the Court); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (a question that "was not raised in the Court of Appeals . . . is not properly before us").

Not only did Petitioners fail to argue for a different standard for cat's paw liability in the courts below, the district court and Eleventh Circuit adopted the very standard that Petitioners advocated. Petitioners should not be allowed to accept and argue for the "mere conduit" standard below, only to switch their position before the Supreme Court.

Petitioners should be estopped from "playing fast and loose with the courts" and assuming a contrary position "simply because [their] interests have changed." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotations and citations omitted). Judicial estoppel prevents parties from doing precisely what Petitioners seek to do here by

stopping parties from "relying on a contradictory argument" to prevail in a different phase of litigation. *Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000).

II. The Decision Below Would Not Change Under a Different Standard for Cat's Paw Liability

Petitioners erroneously argue that "[t]his Court's decision in *Staub* is likely to affect the disposition of the petition in the instant case." (Pet. at 8) To the contrary, reexamining this case under any standard this Court may set forth in *Staub* would lead to the same result. The question presented in both the petition and in *Staub* asks in what circumstances there should be liability where there was some influence on the decisionmaker. The petition for certiorari in *Staub* discussed various standards adopted by courts, including the functional decisionmaker standard, the causation standard, and the influence standard. The Eleventh Circuit decision would be the same regardless of which standard is used.

The Eleventh Circuit affirmed the "well-reasoned order" of the district court in its entirety after having "carefully reviewed the record and the court's order." (Pet. App. 2a) The Eleventh Circuit decision would not change under a different standard for cat's paw liability because the district court's decision – which it affirmed – found that there was no influence over the decisionmaker by a biased subordinate. In fact, any distinction between the "mere conduit" standard and a broader "influence" standard was immaterial to the district court's decision because the court found that even under the lowest possible threshold, Petitioners still would not prevail. Contrary to Petitioners' assertion, the district court did not grant judgment as a matter of law on two separate grounds – under the "mere conduit" standard and under a broader influence standard. Although the district court accepted the "mere conduit" standard – without any analysis, and without objection from Petitioners – the court explained that in this case, a reasonable juror could not have found that Terbecki exerted any influence over the decisionmaker.

Indeed, Petitioners acknowledge in their petition, "The central dispute at trial was whether Phelan had been influenced (and if so, how much) by other Saks officials . . . ." (Pet. at 3) The district court plainly never reached the question of "how much" influence was necessary for cat's paw liability, which forms the crux of the petition. The district court was able to conclude its inquiry with the first part of this question, finding that there was no influence at all. Thus, the Eleventh Circuit decision would not change because there was *no* influence over the decisionmaker in this case.

CONCLUSION

The petition should be denied.

Respectfully submitted,

EDWARD A. BRILL
Counsel of Record
REBECCA L. BERKEBILE
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
212.969.3000
ebrill@proskauer.com

CAROLYN TRAISTER SCHIFF
MCDERMOTT WILL & EMERY LLP
340 Madison Avenue
New York, NY 10173
212.547.5400

JUSTIN B. UHLEMANN
MCDERMOTT WILL & EMERY LLP
201 South Biscayne Boulevard
Suite 2200
Miami, Florida 33131-4336
305.358.3500

Counsel for Respondent

AUGUST 2010

Supreme Court, U.S.
FILED
SEP 2 - 2010
OFFICE OF THE CLERK

No. 09-1535

In The Supreme Court of the United States

LANA PEREZ and ELENA LEFFLER,

Petitioners,

v.

SAKS FIFTH AVENUE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
schnapp@u.washington.edu
Seattle, WA 98195
(206) 616-3167

ERIKA DEUTSCH ROTBART
DEUTSCH ROTBART & ASSOCIATES, P.A.
4755 Technology Way
Boca Raton, FL 33431
edrotbart@dralawfirm.com
(561) 361-8010

Attorneys for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. PETITIONERS DID NOT WAIVE THE QUESTION PRESENTED

Respondent objects that in the courts below petitioners did not challenge the Eleventh Circuit's "mere conduit" standard. (Br. Opp. 7-8). That mere conduit standard, however, has been the controlling law in the Eleventh Circuit for twelve years. Since the standard was first announced in *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir.1998), the Eleventh Circuit itself has applied this rule in nine other cases.[1]

It would have been pointless, if not vexatious, for petitioners to have asked the trial judge to disregard controlling Eleventh Circuit legal standards, and to "argue for a different standard." (Br. Opp. 7). It would have been entirely improper for the District Judge to violate the mere conduit standard established by *Llampallas*, even if the judge disagreed with that requirement. Similarly, the appellate panel which

---

[1] *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 368 Fed Appx. 49, 51 (11th Cir.2010); *Dwyer v. Ethan Allen Retail, Inc*, 325 Fed Appx. 755, 757 (11th Cir.2009); *Shockley v. HealthSouth Central Georgia Rehabilitation Hosp*, 293 Fed Appx. 742, 746 (11th Cir.2008); *Malu v. City of Gainesville*, 270 Fed.Appx. 945, 949 (11th Cir.2008); *Roberts v. Randstad North America, Inc.*, 231 Fed.Appx. 890, 895 (11th Cir.2007); *Tucker v. Housing Authority of Birmingham Dist.*, 229 Fed.Appx. 820, 822-23 (11th Cir.2007); *Hampton v. City of South Miami*, 186 Fed.Appx. 967, 970 n.3 (11th Cir.2006); *Quinn v. Monroe County*, 330 F.3d 1230, 1327 (11th Cir.2003); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir.1999).

considered this case was itself bound by the decisions in *Llampallas* and its progeny, which have long been controlling law of the circuit. Again, it would have been quite pointless, indeed inappropriate, for petitioners to have asked that panel to refuse to apply the binding mere conduit standard.

The procedural posture of the instant case in this regard is similar[2] to that in *Staub v. Proctor Hospital*, No. 09-400. In *Staub*, the respondent objected that the petitioner had failed to object in the lower courts to the Seventh Circuit's "cat's paw" standard.[3] The petitioner in *Staub* pointed out in response that there, as here, because the legal standard in question was well established and governed by controlling circuit law, a litigant in that circuit was not required to ask the lower courts to disregard a standard which those courts were clearly obligated to follow.[4] The United States, in its amicus brief in *Staub*, agreed that it would have been futile for Staub to have

---

[2] In this case, unlike *Staub*, petitioners took the additional step of raising this issue when they filed a petition for rehearing en banc in the court of appeals. That petition expressly noted that "[a]t least three different formulations of the cat's paw doctrine exist in the circuit courts of appeals and [the issue] is ripe for Supreme Court review." Petition for Panel Rehearing and Suggestion for Rehearing En Banc, at 11.

[3] Brief in Opposition, *Staub v. Proctor Hospital*, No. 09-400, at 16-20.

[4] Petitioner's Reply Brief, *Staub v. Proctor Hospital*, No. 09-400, at 10-11.

raised this issue in the lower courts.[5] Given that procedural posture, which was essentially the same as in the instant case, this Court granted certiorari.

The position taken by petitioners in the courts below thus did not waive their right to seek review by this Court of the mere conduit theory that those courts were required to apply.

II. THE COURT OF APPEALS HAS NOT ADDRESSED, BUT MAY CONSIDER ON REMAND, RESPONDENT'S CONTENTION THAT THE ULTIMATE DECISIONMAKERS WERE NOT INFLUENCED BY BIASED COMPANY OFFICIALS

Respondent argues that a biased official in this case, Terebecki,[6] had no influence over the actions of

---

[5] Brief for the United States as Amicus Curiae, *Staub v. Proctor Hospital*, No. 09-400, at 17-18:

> [R]espondent contends ... that certiorari is inappropriate because petitioner never argued below that the Seventh Circuit's *Brewer* standard is incorrect. Given the developed body of law in the Seventh Circuit on the cat's paw doctrine, however, it would have been futile for petitioner to argue before the district court and court of appeals for any different standard.... cf. *MedImmune Inc. v. Genetech Inc.*, 549 U.S. 118, 125 (2007). Thus, petitioner's failure to argue for a different standard below does not preclude a grant of certiorari.

[6] Similarly, respondent contends with regard to the other assertedly biased official, Salerno, that there was no evidence either that Salerno was biased against older workers or that

(Continued on following page)

the final decisionmakers. (Br. Opp. 8-9). In the absence of such influence, respondent insists, the correctness of the Eleventh Circuit *mere conduit* theory would have no impact on the outcome of this appeal. (Br. Opp. 9). Noting that the *district* court concluded that there was no evidence that Terebecki had any influence over the decisions to fire petitioners, respondent argues "[t]hus, the Eleventh Circuit decision would not change because there was *no* influence over the decisionmaker in this case." (Br. Opp. 9) (emphasis in original).

But whether the district court had erred in this conclusion regarding Terebecki's influence was clearly one of the issues raised on appeal and was expressly briefed by the parties in the Eleventh Circuit.[7] Respondent does not appear to seriously contend that the court of appeals actually addressed this fact-bound issue. At most respondent suggests that it may be unclear whether the Eleventh Circuit decided this question.[8]

Salerno had any influence over the decision to fire the plaintiffs. Here, as with Terebecki, the sufficiency of the evidence regarding those factual issues was one of the questions raised but not resolved in the court of appeals.

[7] Initial brief of Appellants/Cross-Appellees Lana Perez and Elena Leffler, at 40-44, 49-52; Brief for Defendant-Appellee-Cross-Appellant, at 32-33, 38-42; Answer Brief of Appellants/Cross-Appellees Lana Perez and Elena Leffler, at 26-36.

[8] Br. Opp. 6:

> Although the Eleventh Circuit quoted the "mere conduit" language included in the district court decision,

(Continued on following page)

The more plausible reading of the Eleventh Circuit's decision is that, rather than considering the complex fact-bound dispute about the extent of Terebecki's influence, the court of appeals simply decided this case on the narrower and easier ground that any such influence did not meet that Circuit's demanding mere conduit theory. There is no need for this Court to address respondent's strained account of the court of appeals decision, or to attempt to resolve the complex fact-bound dispute about Terebecki's role in the decision to dismiss plaintiffs.[9] Both of these are matters that should, and can best, be considered in the first instance by the court of appeals on remand.

CONCLUSION

For the above reasons, this Court should defer action on the petition pending the Court's decision in *Staub v. Proctor Hospital*.

> there is no indication that the Eleventh Circuit ... was avoiding decision on the supposed separate issue of whether Terebecki influenced Phelan's decision at all.

[9] Similarly, there is no need for this Court to address the unresolved (on appeal) dispute about the bias and influence of Salerno.

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
schnapp@u.washington.edu
Seattle, WA 98195
(206) 616-3167

ERIKA DEUTSCH ROTBART
DEUTSCH ROTBART &
ASSOCIATES, P.A.
4755 Technology Way
Boca Raton, FL 33431
edrotbart@dralawfirm.com
(561) 361-8010

Attorneys for Petitioners

**Counsel of Record*